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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

CROWN COAT FRONT CO., INC.,
Petitioner,

V.

UNITED STATES OF AMERICA

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

QUESTIONS INVOLVED

1. Should not the Memorandum for the United States in Opposition, which misrepresents the issues and seeks to mislead the Court, be disregarded by the Court?

2. Is not the question, whether the tolling principle established in *Burnett v. New York Central R. Co.*, 1965, 380 U.S. 424, a Federal Employer's Liability Act action, applies to a Tucker Act discourt action, an important substantial issue to be determined by the Court?

ARGUMENT

1. Since the Memorandum for the United States in Opposition misrepresents the issues and seeks to mislead the Court, it should be disregarded by the Court.

The Memorandum in Opposition (p. 1) erroneously asserts *"The samples were rejected on the ground that they were not sufficiently mildew resistent*[sic]." The samples were mildew resistant but it was found on the colorimetric test method that they *"did not contain the contract quantities of mildew inhibitors."* Pet. App. p. 13. The contract mildew resistant specifications were both qualitative and quantitative.

The Memorandum in Opposition (p. 1) omits the discovery by petitioner in March 1959, of respondent's use of the colorimetric test method, Pet. App. p. 13; and further omits *Appeal of Crown Coat Front Co., Inc.*, 61-2 BCA § 3157, ASBCA 1961, which reports the proceedings to September 19, 1961. The Memorandum in Opposition (p. 2) further omits the change on June 3, 1963 in legal climate due to *United States v. Carlo Bianchi*, 1963, 370 U.S. 709. The Memorandum in Opposition (p. 3) cites the District Court opinion below (Pet. App. p. 31) for its statement that petitioner sought transfer to the Court of

Claims *"for a procedural advantage"* but neglects to inform the Court that the District Court made that statement in a footnote (Pet. App. pp. 31, 32) and then found in the same footnote that there was no such tactical advantage (Pet. App. p. 32). The Memorandum in Opposition (p. 3) asserts that the District Court below held that the statute of limitations is jurisdictional citing Pet. App. pp. 33, 34, whereas the District Court said (Pet. App. p. 34): *"plaintiff's reliance on Burnett is misplaced because the present suit is against the United States, not a private person."*

The Memorandum in Opposition does not cite *Burnett v. New York Central R. Co.*, 1965, 380 U.S. 424, upon which petitioner relies as the first of its reasons for allowance of writ (Pet. p. 9) but informs the Court that petitioner relies on *Nager Electric Co. v. United States*, 1966, 177 Ct. Cl. 234, 368 F.2d 847. Yet, as the petition, p. 9, shows, petitioner cites *Nager* as the second reason for allowance of writ, *Nager* being in conflict with the Court of Appeals determination that the United States is sovereignly immune from tolling. Respondent seeks to mislead the Court.

Here, respondent has said nothing about the application of *Burnett v. New York Central R. Co., supra,* to this case although that was the issue with which the

courts below were concerned[1] and which was the first reason advanced by petitioner for allowance of the writ (Pet. p. 9).[2] Instead respondent represents to the Court that petitioner relies upon *Nager Electric Co. v. United States, supra.* Respondent seeks to mislead the Court.

For such conduct, it is respectfully suggested that the Court should disregard the Memorandum for the United States in Opposition.

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[1] *Crown Coat Front Co. v. United States,* 2 Cir. 1968, 395 F.2d 160, 165 (Pet. App. pp. 20, 21); *Crown Coat Front Co. v. United States,* S.D.N.Y. 1967, 275 F. Supp. 10, 15 (Pet. App. pp. 33, 34).

[2] Respondent itself urged *Burnett v. New York Central R. Co., supra,* upon the Court of Appeals for the 9th Circuit in its action under the False Claims Act: *United States v. Woodbury,* 9 Cir. 1966, 359 F.2d 370.

2. Whether the principle of tolling established in *Burnett v. New York Central R. Co.*, an FELA action, applies to a Tucker Act district court action, is an important substantial question to be determined by the Court.

Burnett v. New York Central R. Co., supra, has been cited by the Court in *Minnesota Mining v. N. J. Wood Co.*, 1965, 381 U.S. 311, 321 (an anti-trust action); *Auto Workers v. Hoosier Corp.*, 1966, 383 U.S. 696, 703 (a Labor Management Relations Act suit); *Honda v. Clark*, 1967, 386 U.S. 484, 501 (a suit under the Trading with the Enemy Act).

Burnett v. New York Central R. Co., supra, has been cited by the Courts of Appeals in *Schwartz v. S.S.Nassau*, 2 Cir. 1965, 345 F.2d 465, 468 (an action for wrongful death against a steamship and her owner); *Moore Co. of Sikeston, Mo. v. Sid Richardson Carbon & Gas Co.*, 8 Cir. 1965, 347 F.2d 921, 927 (an anti-trust action); *Northern Metal Co. v. United States*, 3 Cir. 1965, 350 F.2d 833, 837 (a Tucker Act district court action); *Kondo v. Katzenbach*, D.C.Cir. 1966, 356 F.2d 351, 364 *(sub. nom. Honda v. Clark, supra)*; *United States v. Woodbury*, 9 Cir. 1966, 359 F.2d 370 (an action by the United States under the False Claims Act); *Berry v. Pacific Sportfishing Inc.*, 9 Cir. 1967, 372 F.2d 213, 214 (an action concerning

the Death on the High Seas Act); *Belton v. Traynor*, 4 Cir. 1967, 381 F.2d 82, 86 (an action under the Longshoremen's and Harbor Workers' Compensation Act); *H.L. Peterson Company v. Applewhite*, 5 Cir. 1967, 383 F.2d 430, 434 (a counterclaim for fraudulent misrepresentation); *Shircliff v. Elliott*, 6 Cir. 1967, 384 F.2d 947, 949 (an action for personal injury and property damage resulting from a two-car collision that occurred on the Fort Knox United States Military Reservation); *State of New Jersey v. Morton Salt Company*, 3 Cir. 1967, 387 F.2d 94, 97 (an anti-trust action); *Crown Coat Front Co. v. United States*, 2 Cir. 1968, 395 F.2d 160, 165 (the present case, a Tucker Act district court suit).

Burnett v. New York Central R. Co., *supra*, has been cited by the District Courts in *Safir v. Compagnie Generale Transatlantique*, E.D.N.Y. 1965, 241 F. Supp. 501, 505 (action for ante-mortem damage and for wrongful death based on accident on high seas); *Izquierdo v. Cities Service Oil Co. (Pa.)*, S.D.N.Y. 1965, 244 F.Supp. 758, 760 (Jones Act suit for injuries, maintenance and cure); *Bealle v. Nyden's, Incorporated*, D.Conn. 1965, 245 F.Supp. 87, 90 (diversity action arising out of automobile accident); *Higgins, Inc. v. Kiekhaefer Corporation*, E.D.Wisc. 1965, 246 F.Supp. 610, 611 (patent infringement); *A. O. Smith Corporation v. Applewhite*, S.D.Tex. 1965, 255 F.Supp. 785, 795 (diversity action on note covering feed storage apparatus); *United States v. Vibradamp Corporation*, S.D.Cal. 1966, 257 F.Supp. 931, 940 (action

by United States to recover sum due on Government contract after redetermination proceeding); *Atkins v. Schmutz Manufacturing Company*, W.D.Va. 1967, 268 F.Supp. 406, 407 (diversity action for personal injuries); *Mumpower v. Southern Railway Company*, W.D.Va. 1967, 270 F.Supp. 318, 319 (Federal Employers Liability Act suit); *Chambliss v. Coca-Cola Bottling Corporation*, E.D.Tenn. 1967, 274 F.Supp. 401, 410 (a stockholder's suit under the Securities Act of 1933); *Crown Coat Front Co. v. United States*, S.D.N.Y. 1967, 275 F. Supp. 10, 15 (the present case, a Tucker Act district court action); *Ptaszynki v. Ferrell*, E.D.Tenn. 1967, 277 F.Supp. 969, 970 (diversity action for personal injuries).

In the District Court below, *Crown Coat Front Co. v. United States*, S.D.N.Y. 1967, 275 F.Supp. 10 (Pet. App. p. 23), the court discussed the application of the tolling principle of *Burnett v. New York Central R. Co.*, *supra*, to the present Tucker Act district court action and said, 275 F.Supp. at 15 (Pet. App. p. 33): *". . . plaintiff's reliance on Burnett is misplaced because the present suit is against the United States, not a private person."* [3] In the Court of Appeals, below *Crown Coat Front Co. v. United States*,

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[3]. Contrary to *Honda v. Clark*, 1967, 386 U.S. 484, 501.

2 Cir. 1968, 395 F.2d 160, the Court relegated *Burnett v. New York Central R. Co., supra,* to a footnote, 395 F.2d at 165 (Pet. App. p. 20), and reasoned that the Tucker Act limitation was not subject to tolling[4] and that petitioner should have urged the tolling principle of *Burnett v. New York Central R. Co., supra,* decided April 5, 1965, when before the District Court *"the first time around"* (395 F.2d at 165, Pet. App. p. 21) whose decision was filed January 29, 1965 (Pet. p. 6).

In the Memorandum for the United States in Opposition, filed herein August 15, 1968, *Burnett v. New York Central R. Co., supra,* is not mentioned at all.

This might be viewed as an illustration of the law of diminishing returns. In the District Court's opinion, *Burnett v. New York Central R. Co., supra,* is in the body of the opinion; in the Court of Appeals' opinion, it is relegated to a footnote; in the Memorandum for the United States in Opposition, it is not at all.

It is suggested that *Burnett v. New York Central R. Co., supra,* should be restored to its rightful place in the judicial hegemony. The grant of certiorari herein would do this.

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4. Contrary to *Northern Metal Co. v. United States,* 3 Cir. 1965, 350 F.2d 833.

This is particularly appropriate, since the United States urged the *Burnett v. New York Central R. Co.*, *supra*, rule of tolling in *United States v. Woodbury*, 9 Cir. 1966, 359 F.2d 370, an action by the United States under the False Claims Act (31 U.S.C. §§ 231-33).

The Memorandum for the United States in Opposition contends (Memorandum p. 4) on the authority of *United States v. Sherwood*, 1941, 312 U.S. 584 and *Soriano v. United States*, 1957, 352 U.S. 270, that the limitation provision of the Tucker Act may not be extended by tolling. But this is contrary to *Northern Metal Co. v. United States*, 3 Cir. 1965, 350 F.2d 833, and on this issue alone certiorari should be granted. There is an unresolved conflict as to this issue. See *Crown Coat Front Co. v. United States*, 1967, 386 U.S. 503 at 508-9; *Crown Coat Front Co. v. United States*, 2 Cir. 1968, 395 F.2d 160 at 165 (Pet. App. p. 21).

The Memorandum for the United States in Opposition contends (Memorandum pp. 4, 5) that the transfer provisions of 28 U.S.C. §§ 1406 and 1506, and S.Rep. No. 1894, 86th Cong. 2d Sess., p. 2, do not save the cause of action if it is dismissed rather than transferred, and that *"filing suit in the wrong court cannot operate either to shorten or enlarge the applicable statute of limitations."* This has no application here. We are not concerned with shortening or enlarging the statute of limitations but with tolling it. The transfer provisions of 28 U.S.C. §§ 1406(c) and 1506 are respectively:

"the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court" and *"where the case shall proceed as if it had been filed in the district court on the date it was filed in the Court of Claims."* Such language makes it clear that filing in the wrong court does not shorten and does not enlarge the applicable statute of limitations, but the limitation period stops when suit is filed in the wrong court. The Memorandum for the United States in Opposition simply advances this contention in an effort to mislead the Court. It has no relevance to this case.

The Memorandum for the United States in Opposition further asserts (Memorandum p. 5) that petitioner relies as its sole reason for allowance of writ of certiorari upon *Nager Elec. Co. v. United States*, 1966, 177 Ct. Cl. 234, 368 F.2d 847, but that *Nager* does not apply since petitioner has not attempted to join alternative claims based on the disputes clause and on breach of contract. Respondent's own explanation convicts it of an attempt to mislead the Court. Petitioner does rely on *Nager* solely for the principle that the United States is not sovereignly immune from tolling (Pet. p. 9). In the same sentence (Pet. p. 9) in addition to *Nager* petitioner cites *Honda v. Clark*, 1967, 386 U.S. 484; *United States v. Yellow Cab Co.*, 1951, 340 U.S. 547; and *Northern Metal Co. v. United States*, 3 Cir. 1965, 350 F.2d 833. Respondent in its Memorandum seeking to mislead the Court, says: *"Unlike Nager Electric Co.*

v. United States, 368 F. 2d 847 (Ct.Cl.) on which petitioner relies..." This is clearly improper and respondent's counsel should not be permitted to thus conduct themselves before the Court.

Respondent urges (Memorandum pp. 5, 6) that petitioner should be censured for failing to determine initially whether its claim for relief was within the disputes clause or was founded on breach of contract. But here the contracting officer and the Board of Appeals considered petitioner's claim to be within the disputes clause: *Appeal of Crown Coat Front Co.*, 63-1 BCA § 3681, ASBCA 1963, as did the Court of Appeals: *Crown Coat Front Co. Inc. v. United States*, 2 Cir. 1966, 382 F.2d 407. The inquiry came up during oral argument before the Court and was expressed in the Court's opinion: *Crown Coat Front Co. v. United States*, 1967, 386 U.S. 503, 522: *"The Government in its answer to the complaint, however, denied that the claim arose under the contract, characterized it instead as a pure breach of contract claim which accrued no later than the date of the completion of the contract. The District Court did not decide this issue; nor do we. This matter will be open on remand to the District Court. If the claim is not within the disputes clause, the court may then determine whether it was time barred."* This change in legal climate occurred in *United States v. Utah Constr. & Mining Co.*, 1966, 384 U.S. 394, followed by Judge Davis' exhaustive review and analysis of the difference between

disputes clause claims and breach of contract claims in *The Len Company v. United States*, 1967, 181 Ct. Cl. , 385 F.2d 438. Petitioner has always presented its claim in the prevailing legal climate. That there has been a change in the legal climate is a normal incident of the judicial process. See *Union Bag-Camp Paper Corp. v. United States*, 1966, 177 Ct. Cl. 212, 366 F.2d 1011.

The Memorandum for the United States in Opposition (Memorandum p. 2) contends that "*apparently*" petitioner's failure to exercise due diligence in inquiring into the type of test used was the cause of petitioner's failure to penetrate the concealment by defendant of its use of a colorimetric method to test the mildew inhibitor content of petitioner's dyed felt. But this is pure conjecture on respondent's part as its use of the qualifying "*apparently*" indicates. Conjecture is not fact, as respondent's own statement admits.

Clearly the principle of *Burnett v. New York Central R. Co.*, *supra*, is the focal point in this petition. The issue is whether under the Tucker Act a timely Court of Claims action, instituted December 12, 1962, tolled the running of the statute of limitations so that the District Court action, instituted July 31, 1963 was timely, even though the Court of Claims action was dismissed without prejudice on respondent's motion on August 19, 1963. Respondent has always been on notice of petitioner's claim: See *Telegraphers v. Ry. Express Agency*, 1943, 321 U.S. 342, 348-349.

Clearly the issue of the application of the rule of *Burnett v. New York Central R. Co., supra,* so frequently before the courts, should be resolved by the granting of the writ of certiorari prayed for herein.

CONCLUSION

The Memorandum for the United States in Opposition is replete with error and misrepresentation, there being some six instances where it has sought to mislead the Court.

Burnett v. New York Central R. Co., supra has been cited by the Court in cases involving an anti-trust action; a Labor Management Relations Act suit; and an action under the Trading with the Enemy Act. *Burnett* has been cited by the Courts of Appeals in cases involving action for wrongful death; an anti-trust suit; Tucker Act action; False Claims Act action; Death on the High Seas Act action; Longshoremen's and Harbor Workers' Act action; fraudulent misrepresentation action; and an United States Military Reservation automobile accident action. *Burnett* has been cited by the District Courts in suits involving an action concerning an accident on the high seas; a Jones Act seaman's suit; a patent infringement suit; a feed storage apparatus suit; a suit concerning Government contract redetermination proceedings; a diversity action; and a stockholder's suit.

This petition for certiorari raises the question whether *Burnett* is applicable to

a Tucker Act District Court suit. The application of the tolling principle of *Burnett* is an important and substantial question which should be decided by the Court.

Accordingly it is respectfully requested that the writ of certiorari prayed for be granted.

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